

ATT EXPERT GROUP

Arms exports,
terror and crime:
Reducing risk under
the Arms Trade Treaty

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Introduction

Since the Arms Trade Treaty (ATT)¹ entered into force in 2014, States Parties have formally met for six Conferences of States Parties (CSP) in an effort to coordinate their interpretation and implementation of the landmark treaty. The CSP process, the ATT Working Groups that feed into that process, and the numerous NGOs that contribute their expertise, analysis and advocacy have worked hard these past six years to support the work of interpreting and fully implementing the ATT.

Despite that work, there has been comparatively little discussion of the provisions within ATT Article 7(1)(b)(iii–iv) relating to terrorism and transnational organised crime (TNOc). The reasons for this remain unclear. However, one thing is evident: in the absence of substantive discussions on the implementation of the terrorism and TNOc provisions under Article 7, common interpretations of those provisions will remain elusive and States Parties' implementation practices will inevitably diverge.

The provisions of Article 7(1)(b)(iii–iv) deal with separate but overlapping bodies of international law. There are just four international conventions and protocols relating to TNOc, while there are 19 relating to terrorism. However, these conventions and protocols do not exist in a vacuum. Rather, they sit atop a larger body of international policy and practice – spanning United Nations (UN) Security Council Resolutions, General Assembly Resolutions, reports and publications by a wide array of UN and regional organisations, and many years of developed state practice. For the purposes of understanding the ATT and States Parties' obligations under it relating to terrorism and TNOc, the clear focus is on written and agreed-upon treaty law.

This briefing aims to serve a dual purpose: both stimulating future discussions on the application and implementation of Article 7(1)(b)(iii–iv), and contributing to those discussions. The paper provides a legal analysis of the provisions at hand, laying out relevant conventions and protocols, exploring the meanings of several key terms in Article 7, and considering how the Article 7 risk assessment asks States Parties to consider the interplay between terrorism and TNOc, on the one hand, and peace and security, on the other. The paper concludes with an exploration of how this analysis can help inform States Parties' export risk assessment processes, aided by a few hypothetical case studies. In an effort to provide concrete and tangible tools for States Parties as they work to implement the ATT uniformly, annexed to the briefing is a comprehensive list and explanation of the offences laid out in the 23 conventions and protocols relating to terrorism and TNOc.

¹ United Nations (2013), 'The Arms Trade Treaty' (<https://www.thearmstradetreaty.org/hyper-images/file/TheArmsTradeTreaty1/TheArmsTradeTreaty.pdf>)

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Legal analysis

Article 7 of the ATT requires an exporting State Party, in an ‘objective and non-discriminatory’ manner, to ‘assess the potential’ that, *inter alia*, the exported items:

- ‘would contribute to or undermine peace and security’
- ‘could be used to ... commit or facilitate an act constituting an offence under international conventions or protocols’ relating to terrorism or TNOc to which the exporting state is a party

In other words, an exporting State Party must consider *both* the effects of the transfer on peace and security *and* the possibility that the weapons transferred could be used to commit or facilitate acts deemed terrorist or transnational criminal offences under international law, according to the exporting state’s obligations.

International conventions or protocols relating to terrorism or transnational organised crime

Article 7 requires States Parties to evaluate the potential that the weapons they export could be used to commit or facilitate offences under international conventions or protocols relating to terrorism and TNOc. Each State Party’s obligations under Article 7 are determined by the conventions and protocols which the ATT State Party in question has ratified.

Importantly, it is the *exporting* state’s obligations under international law that are relevant to this analysis. The existence or absence of international legal obligations or commitments on the part of the importing state is not relevant in this respect. So, for example, the exporting state must consider whether the weapons could be used to commit or facilitate offences under all international counter-terrorism conventions to which the exporting state is a party – including those conventions which the importing state has not ratified.

International conventions and protocols relating to terrorism

To date, there is no single international treaty that defines all terrorism-related offences under international law.² States have spent the last 25 years negotiating an instrument known as the Comprehensive Convention against International Terrorism,

² The first true counter-terrorism treaty – the 1937 Convention for the Prevention and Punishment of Terrorism – was adopted under the League of Nations. It was specifically designed to ‘mak[e] more effective the prevention and punishment of terrorism of an international character’. This comprehensive Convention defined terrorism as ‘criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’. The Convention also mandated the criminalisation of terrorist acts within states’ domestic legal systems. When the League of Nations was dissolved, this Convention largely fell by the wayside. See League of Nations (1937), ‘Convention for the Prevention and Punishment of Terrorism’, Preamble and Article 1 (<https://dl.wdl.org/11579/service/11579.pdf>)

but that agreement has not been finalised. Instead, a piecemeal approach has prevailed. Currently, there are 19 treaties and protocols that directly and primarily address terrorism and multilateral efforts to counter terrorism. However, none of them include a clear definition of terrorism, though many identify specific acts that constitute terrorism or that States Parties must criminalise in their domestic systems.

The ATT requires an exporting State Party to consider if the exported weapons could be used to commit or facilitate ‘an act constituting an offence’ under international treaties and protocols relating to terrorism. An ‘offence’ under those treaties can be interpreted in one of two ways. Under one interpretation, an ‘offence’ could be understood to mean any action, whether taken by a private individual or a State Party, which constitutes a ‘wrongful act’ under international law.³ Generally, a State Party commits a wrongful act where it acts in violation of its obligations under international law. The wrongful actions of private actors may also be attributed to the State Party under a narrow set of conditions relating, for example, to the State Party’s degree of control over its territory or the activities of insurgent non-state actors.⁴ This ‘wrongful act’ interpretation of ‘offence’ is broad and sweeping, including a wide array of state and private conduct that is strictly out of compliance with a state’s international legal obligations.

Alternatively, an ‘offence’ could be understood to mean an act that relevant treaties declare to constitute terrorism or to otherwise be wrongful or punishable. The vast majority of the treaties and protocols relating to terrorism specifically enumerate ‘offences’ under the agreement.⁵ These treaties and protocols tend to use the word ‘offence’ to describe the actions they seek to prohibit and to motivate States Parties to punish.⁶ As a result, the most logical interpretation of the ATT understands ‘offence’ to mean an act defined to constitute terrorism or otherwise be wrongful or punishable under the relevant sources of international law.

There are 19 international conventions and protocols relating to terrorism, and each sets up a variety of offences.⁷ For example:

- The Convention for the Suppression of Unlawful Seizure of Aircraft requires States Parties to define hijacking aircraft as a criminal offence under domestic law.
- The International Convention for the Suppression of the Financing of Terrorism requires that States Parties hold financiers of terrorism criminally, civilly or administratively liable.
- The Convention on the Physical Protection of Nuclear Material requires States Parties to criminalise the theft of nuclear material.

[See Annex for a complete list of the international conventions and protocols relating to terrorism, and key offences defined under each.]

³ For a comprehensive explanation of ‘wrongful acts’ under international law, see the International Law Commission (2001), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’, Document A/56/10 (https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf)

⁴ *Ibid.* Most often, the wrongful actions of private actors are attributed to a state when the prevailing government fails to take adequate action to prevent the wrongful acts of others, or when the prevailing government has insufficient control over its territory to rein in the wrongful behaviour of private actors.

⁵ See, for example, United Nations (1988), ‘Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation’, Article 3 (<https://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>)

⁶ Anyone can commit an offence as defined under such treaties. Most require states to create criminal offences, although some allow for civil or administrative liability rather than criminal liability. Each state’s domestic law regarding other states’ actions, state actor immunity, etc., would determine if government actors can be held liable in their official capacity for committing those offences.

⁷ It is important to note that there may be tension between international treaties and protocols relating to terrorism, on the one hand, and international humanitarian law, on the other. If interpreted too broadly, the international treaties and protocols relating to terrorism might be read to require States Parties to criminalise acts that are considered lawful under international humanitarian law. For example, under international humanitarian law, during the course of armed conflict, a party to that armed conflict may lawfully target military objects – including, for example, a military barracks. By contrast, international laws relating to terrorism ask states to define as a terrorist (and therefore criminal) act the destruction of a government or public facility for the purposes of influencing a government by intimidation or coercion, among other motives. Under these overlapping fields of law, a non-state armed group attacking a military barracks during the course of a non-international armed conflict for the purpose of attaining concrete military gains or attempting to induce surrender could be both lawful under international humanitarian law and unlawful as an act of terrorism under other international and national law.

International conventions and protocols relating to transnational organised crime

There are four primary conventions and protocols relating to TNOC. Each sets out activities that States Parties must criminalise and work to prevent. As with the conventions and protocols relating to terrorism, the most logical interpretation of the ATT understands 'offence' to mean an act defined to constitute TNOC or otherwise be wrongful or punishable under the relevant sources of international law.

The primary international instrument regarding TNOC is the UN Convention against Transnational Organized Crime (UNCTOC).⁸ Under this Convention, States Parties commit to 'taking a series of measures against transnational organised crime, including: the creation of domestic criminal offences such as participation in an organised criminal group, money laundering, corruption and obstruction of justice; the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.'⁹

In addition, the Convention is supplemented by three protocols, all of which were adopted concurrently with, or shortly after, UNCTOC itself:

- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, includes an agreed-upon definition of trafficking in persons, in order 'to facilitate convergence in national approaches' and 'protect and assist the victims of trafficking in persons with full respect for their human rights'.¹⁰
- The Protocol against the Smuggling of Migrants by Land, Sea and Air includes an agreed-upon definition of smuggling of migrants. As a whole, this Protocol 'aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States Parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation'.¹¹
- The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition aims 'to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of, and trafficking in, firearms, their parts and components and ammunition'. To comply with this Protocol, States Parties must 'adopt a series of crime-control measures and implement, in their domestic legal order, three sets of normative provisions: the first relates to the establishment of criminal offences related to illegal manufacturing of, and trafficking in, firearms on the basis of the Protocol requirements and definitions; the second to a system of government authorizations or licensing intending to ensure legitimate manufacturing of, and trafficking in, firearms; and the third to the marking and tracing of firearms'.¹²

[See Annex for a complete list of the international conventions and protocols relating to TNOC, and key offences defined under each.]

Commit or facilitate

Key to the Article 7 risk assessment is the exporting State Party's assessment of whether the weapons could be used to *commit* or *facilitate* various offences under international law.

⁸ UN Office on Drugs and Crime (2019), 'United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (<https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>)

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

Generally speaking, how can weapons be used to ‘commit or facilitate’ harms or offences?

Under international law, treaty terms must be interpreted in light of their ordinary meaning.¹³ Similarly, when two or more terms are used in a list, international law presumes that those terms have distinct meanings from one another.¹⁴ Using this approach, ‘commit’ can be understood to mean ‘to perpetrate or carry out’. ‘Commit’ implies directly carrying out an action, and therefore ‘facilitate’ must mean something different. Ordinarily, ‘facilitate’ means ‘to make something possible or easier’.¹⁵ This suggests that, in the context of the ATT, ‘facilitate’ adds a ‘broader range of conduct and arms usage that export officials should consider’.¹⁶

International law also requires that the interpretation of a treaty is consistent with its object and purpose.¹⁷ The ATT’s purposes include ‘[c]ontributing to international and regional peace, security and stability’ and ‘[r]educing human suffering’.¹⁸ The plain meaning of the Treaty text understands ‘commit’ to mean ‘to carry out’ and ‘facilitate’ to mean ‘to make easier’. This meaning serves to reinforce the ATT’s purposes of preventing instability and human suffering by ensuring that exporting States Parties attend to the broad scope of weapons use that can cause or contribute to harms recognised under international law.

The *Oxford Commentary* on the ATT reinforces this understanding of ‘commit or facilitate’ in its explanation of Article 7(1)(b)(i–ii), on the use of weapons to commit or facilitate violations of international human rights and humanitarian law. The *Commentary* notes that the use of arms ‘may be one or more steps removed from the actual violation’ of relevant international law, but still facilitates the violation itself.¹⁹

The *Commentary* also provides several examples of the use of weapons to ‘facilitate’ violations. These include, for example, ‘weapons that could be used to round up people who are later summarily executed with other weapons or by other means’.²⁰ This could take the form of military vehicles being used to round up people who are later executed with assault rifles. The treaty text directly points to the need for exporting States Parties to consider, in their risk assessment processes, both the potential use of weapons under the scope of the Treaty to directly *commit* harms (for example, the assault rifles used for summary execution) and the potential use of weapons to indirectly *facilitate* those harms (for example, the military vehicles used to gather together the victims).

There are certainly alternative interpretations of ‘commit or facilitate’. Interpretations that analogise between ‘commit or facilitate’ on the one hand, and state complicity or an ‘aiding and abetting’ standard on the other hand, have been considered, but these interpretations are inconsistent with the ATT’s purpose.²¹ Both state complicity and the ‘aiding and abetting’ standard are derived from legal regimes whose purpose is to

¹³ United Nations (1980), ‘Vienna Convention on the Law of Treaties’, Article 31 (https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf)

¹⁴ Although this principle is not enshrined in the Vienna Convention on the Law of Treaties, it is widely understood as a rule of logic in interpreting treaties. See, for example, Senegacnik A (2018), ‘Expressio Unius (Est) Exclusio Alterius’, *Max Planck Encyclopaedias of International Law*, February.

¹⁵ ‘Facilitate’ in *Oxford English Living Dictionaries*, 2019; ‘Facilitate’ in *Merriam-Webster Online Edition* (<https://www.merriam-webster.com/dictionary/facilitate>)

¹⁶ Note that this is consistent with how other legal experts have interpreted the word ‘facilitate’ as it applies elsewhere in Article 7. See, for example, Casey-Maslen S et al. (2016), *The Arms Trade Treaty: A Commentary* (Oxford: Oxford University Press), para. 7.35. See also Harvard Law School International Human Rights Clinic (2019), ‘Interpreting the Arms Trade Treaty: International Human Rights Law and Gender-Based Violence in Article 7 Risk Assessments’, April, p 6.

¹⁷ United Nations (1980), ‘Vienna Convention on the Law of Treaties’, Article 31 (https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf)

¹⁸ United Nations (2013), ‘The Arms Trade Treaty’, Article 1 (<https://www.thearmstradetreaty.org/hyper-images/file/TheArmsTradeTreaty1/TheArmsTradeTreaty.pdf>)

¹⁹ Casey-Maslen S et al. (2016), *The Arms Trade Treaty: A Commentary* (Oxford: Oxford University Press), para. 7.35.

²⁰ Ibid.

²¹ Note that ‘responsibility for complicity only accrues after the principal wrongful act is committed’ and therefore is in direct contrast to the forward-looking and preventive nature of the ATT; Lanovoy V (2015), ‘Complicity’ in *Max Planck Encyclopaedia of Public International Law*, December, p 14. See also International Law Commission (2001), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’, Document A/56/10 (https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf)

create liability and assign fault to individuals for their past violations of international law; neither aims to anticipate, or to prevent, harms. Although the ATT demands that, as part of its risk assessment, an exporting State Party looks closely at an importing state's past behaviour as an indicator of future risks of harm, the primary purpose of the ATT is forward-looking. In other words, the ATT requires an exporting State Party to look at the destination country's past violations in order to consider the role of weapons in the future perpetration of harm, rather than for the sake of establishing individual criminal liability for those past harms.

Therefore, a forward-looking interpretation of 'commit or facilitate', based on the plain meaning of the terms, is most appropriate in understanding Article 7.

How can weapons be understood to be used to 'commit or facilitate' offences under international law relating to terrorism and/or transnational organised crime?

As noted above, there are 19 distinct international treaties and protocols relating to terrorism, and the vast majority use the word 'offence' to describe the actions they seek to prohibit and to motivate States Parties to punish. Likewise, the four international treaties and protocols relating to TNOC clearly set out actions they seek to curtail. As a result, the most sensible interpretation of the ATT understands 'offence' to mean an act defined to constitute terrorism or TNOC, or otherwise be wrongful or punishable, under the relevant sources of international law.

Meanwhile, it is clear that the offences established under international treaties and protocols relating to terrorism and TNOC vary widely (see Annex for details). In the terrorism treaties, offences span individual personal or property crimes (killing or kidnapping an internationally protected individual, for example), maritime offences (such as seizing control of a ship, or using a ship to further a terrorist purpose), and large-scale harm (placing and/or detonating an explosive on board a civil aircraft, or interfering with civil aviation navigation). In transnational crime treaties, offences are similarly broad, spanning corruption, smuggling in persons, money laundering, arms trafficking and more.

Arms can clearly be used to 'commit' offences under international law in these fields. Arms are used to 'commit' offences when they assist in directly carrying out or perpetrating the action. If the offence in question is causing bodily harm to an individual, then a weapon could be used to directly inflict that harm. If the offence is hijacking a civil aircraft, then a weapon could be used to wrest control of the aircraft from the authorised pilot(s). If the offence in question is smuggling in persons, weapons could be used to guard the human cargo against discovery by the authorities.

The slightly greater challenge in interpreting the Article 7 risk assessment is in determining how arms can 'facilitate' the harms Article 7 aims to prevent. As noted earlier, the plain meaning of 'facilitate' – 'to make easier' – is the most sensible and straightforward interpretation of Article 7. This meaning rightfully encompasses a significantly wider scope of uses of weapons than is afforded to the word 'commit'. Often, weapons are thought to 'facilitate' offences when they embolden the weapon-holder, subdue the victim or assist in the perpetration of a predicate act that comes before the ultimate offence. If the offence, for example, is using a ship to further a terrorist purpose, the offender who does so might first wrest control of the ship with the aid of weapons. If the offence is smuggling migrants, the smuggling itself might not directly involve the use of a weapon, but the subduing of migrants might – constituting a facilitation of the smuggling. If the offence is corruption, in a sale of weapons whose preferential terms are established to elicit an official's improper derogation from their official duties, the weapons are integral to the corrupt transaction – constituting facilitating corruption.

The ATT's Article 7 risk assessment requires exporting States Parties to consider the use of weapons for both commission and facilitation with equal weight – and as factors weighing heavily on the risk assessment.

Peace and security

ATT Article 7(1)(a) requires States Parties to evaluate whether the weapons they export 'would contribute to or undermine peace and security'.²²

Defining 'peace and security'

'Peace and security' should be interpreted broadly. References to 'international', 'regional' and 'national' peace and security appear in UN documents, various international treaties and within the ATT itself,²³ suggesting that 'peace and security' can be geographically limited. In contrast, Article 7 of the ATT refers only to 'peace and security', without limit or modification. Therefore, we should understand Article 7's 'peace and security' to cover domestic, regional and international concerns.

Although traditional notions of 'peace and security' tended to focus on the presence or absence of conflict, the modern trend takes a more encompassing approach, as evidenced in countless UN General Assembly and UN Security Council resolutions across the past two decades.²⁴ Conceptually, this idea has its roots in the UN Charter commitment to protecting the 'material conditions of peace', rather than just peace itself.²⁵ Far from looking only at the existence of conflict, modern considerations of 'peace and security' include a holistic assessment of human welfare. Human welfare is a broad concept. It includes the absence of physical threats to life, as well as effective rule of law, protection of dignity and socio-economic welfare.²⁶ The ATT's own text recognises the interconnectedness and 'mutually reinforcing' relationship between human welfare and peace and security.²⁷

Defining 'contribute to or undermine'

Traditionally, the maintenance of 'peace and security' is invoked in the context of actions or phenomena that are 'threats' to peace and security. But the ATT requires States Parties to consider both how exported weapons could threaten ('undermine') peace and security and how those weapons could bolster ('contribute to') that peace and security.

The *Oxford Commentary* on the ATT provides helpful suggestions regarding how weapons might contribute to or undermine peace and security. According to the *Commentary*, arms exports could *contribute* to peace and security by enabling a state 'facing an insurgency or a terrorist threat to be able to defend itself'; or to 'seal and

²² United Nations (2013), 'The Arms Trade Treaty', Article 7 (<https://www.thearmstradetreaty.org/hyper-images/file/TheArmsTradeTreaty1/TheArmsTradeTreaty.pdf>)

²³ *Ibid.*, 'Preamble, Principles, and Article 1'.

²⁴ Note that the UN General Assembly and the UN Security Council have voiced their support for the idea that human welfare is central to sustainable peace and security. See UN General Assembly (2005), 'World Summit Outcome', A/RES/60/1 (https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf). See also UN General Assembly (2015), 'Transforming our world: the 2030 Agenda for Sustainable Development', A/RES/70/1 (https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf); UN Security Council Resolution 1325 (2000), S/RES/1325 (<https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WP5%20SRES1325%20.pdf>); UN Security Council Resolution 2122 (2013), S/RES/2122 (https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2122.pdf)

²⁵ d'Argent P, Susani N (2009), 'United Nations, Purposes and Principles', in *Max Planck Encyclopaedia of Public International Law*, March.

²⁶ See, for example, Economic and Social Council (1993), 'Conclusion of the High-Level Ministerial Segment', E/1993/102 (<https://digitallibrary.un.org/record/174748?ln=en>); UN General Assembly (2013), 'Follow-up to General Assembly resolution 66/290 on human security', A/68/685 (<https://digitallibrary.un.org/record/763700?ln=en>); UN General Assembly (2015), 'Transforming our world: the 2030 Agenda for Sustainable Development', A/RES/70/1 (https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf)

²⁷ United Nations (2013), 'The Arms Trade Treaty', Preamble (<https://www.thearmstradetreaty.org/hyper-images/file/TheArmsTradeTreaty1/TheArmsTradeTreaty.pdf>)

control its borders to prevent infiltration by foreign terrorists or organised criminal gangs.²⁸ Conversely, arms exports could *undermine* peace and security if they are provided to ‘states that may wage illegal war against other states’ or engage in ‘wanton repression of [their] own people’.²⁹ In all cases, including when the importing state faces serious security challenges, an exporting ATT State Party must assess the risk that the weapons could be used for impermissible ends, consistent with the Treaty’s obligations under Article 6 and Article 7.

An exporting State Party should consider several factors in evaluating whether a potential weapons export would contribute to or undermine peace and security. Those factors include:

- Likely effects of the export on international and regional peace and security. This evaluation must consider both:
 - the potential bolstering effect that preventive measures, such as disarmament and arms control, can have on peace and security
 - the potential destabilising effect that excessive accumulations of weapons can have on regional and international peace and security
- Implications of the export for the destination country’s domestic peace and security, including any potential for the weapons to exacerbate or mitigate civil insurgencies, state persecution and local unrest.
- Particular effects of both the *quantity* and the *type* of arms being transferred on peace and security, considering both the relevant export in isolation and the relevant export in combination with other recent or upcoming transfers of weapons.
- Potential effects of the export on human welfare in a holistic sense – a consideration that must be reiterated throughout the assessment.³⁰

Terrorism, transnational organised crime, and peace and security

Article 7 requires exporting States Parties to conduct a thorough assessment, considering the effects of the would-be exported arms on peace and security, along with the chance that those arms could be used to commit or facilitate offences under international law, including laws relating to terrorism or TNOC. This process has two discrete steps: first, assessing the potential positive and negative effects of the transfer on peace and security; and second, assessing the risk that the weapons transferred could be used to commit or facilitate an offence under the relevant fields of law. Although these steps are discrete, it is quite likely that the evaluation in step two may feed back into, and inform, the evaluation in step one. As a result, the risk assessment requires a clear understanding of how international law concerning terrorism and TNOC relates to peace and security.

Terrorism and TNOC are commonly understood to undermine peace and security – domestically, regionally and internationally. The international community thus seeks to limit activities relating to both terrorism and organised crime because of a fundamental belief that both terrorism and organised crime make the world less safe.

We need look no further than the language of the many treaties and protocols on these subjects for support. Nearly all of the treaties relating to terrorism and TNOC specifically invoke ‘peace’ and/or ‘peace and security’, as well as the pivotal role of the UN in maintaining peace and security, as central to the treaties’ purpose.³¹ This consensus is reflected across UN documents, including key UN General Assembly and

²⁸ Casey-Maslen S et al. (2016), *The Arms Trade Treaty: A Commentary* (Oxford: Oxford University Press), para. 7.33.

²⁹ *Ibid*, para. 7.34.

³⁰ Harvard Law School International Human Rights Clinic (2019), ‘Interpreting the Arms Trade Treaty: International Human Rights Law and Gender-Based Violence in Article 7 Risk Assessments’, April, p 9.

³¹ See, for example, United Nations (2001), ‘Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition: Preamble’ (https://treaties.un.org/doc/source/recenttexts/18-12_c_e.pdf)

UN Security Council resolutions on terrorism and transnational crime, to justify the UN's central role in coordinating international activity to counter both phenomena.³²

The treaties covered by Article 7(1)(b)(iii–iv) – those relating to terrorism and to TNOc – are all motivated, at least in theory, by the furthering and maintenance of international peace and security. By criminalising terrorism or creating a consistent scheme of liability for TNOc, the international community theoretically aims to bolster peace and security. It logically follows that the violation of these conventions – including the use of exported weapons to further offences defined under these conventions – should be understood to be undermining peace and security.³³

In other words, if an exporting State Party concludes that exported arms could be used to commit or facilitate offences under those fields of law in the 7(1)(b) evaluation, the State Party should also conclude that the exported weapons would undermine peace and security under the 7(1)(a) evaluation.

But the assessment should not end there. Although, as noted above, international law relating to terrorism and TNOc theoretically aims to bolster peace and security, the reality is murkier. Even where there is a real terrorist threat, as has been well-documented by UN experts and NGOs, all too often states' counter-terrorism efforts serve to undermine the very peace and security they aim to protect. Counter-terrorism laws and their enforcement frequently violate human rights, escalate civil unrest, shrink space for civic engagement,³⁴ undermine access to opportunity, and drive recruitment for the very terrorist organisations the law seeks to punish.³⁵

Also worth considering are the political implications and imperatives bearing on states. The description of certain actors as terrorist or criminal may serve complicated political ends, and may at times be used to countenance policies and practices that might otherwise be harder to justify.

In other words, counter-terrorism efforts often bring with them serious deleterious effects on human rights, human welfare, and peace and security. As a result, a state's compliance with international laws relating to terrorism does not guarantee that the state is contributing to peace and security, nor that transferring weapons to that state will contribute to peace and security. Instead, an exporting State Party must look carefully at the importing state's actual practices regarding terrorism and organised crime, carefully evaluating the positive and negative effects of those practices on peace and security. If the importing state's policies or activities relating to terrorism and organised crime undermine human rights, escalate violence, shrink civic space, and/or drive recruitment to violent extremist organisations, and if the export of arms could be used to commit or facilitate violations under the relevant law, then the exporting State Party must conclude that the export fails the Article 7 risk assessment (see next chapter for further discussion).

³² See, for example, UN Security Council Resolution S/RES/2462 (2019) ([https://undocs.org/en/S/RES/2462\(2019\)](https://undocs.org/en/S/RES/2462(2019))) and UN Security Council Resolution S/RES/2396 (2017) ([https://undocs.org/S/RES/2396\(2017\)](https://undocs.org/S/RES/2396(2017)))

³³ Note that these are both presumptions, and are therefore rebuttable. A State Party could, while in compliance with its obligations under these treaties, in fact undermine peace and security; likewise, a State Party could theoretically act in violation of these treaties but in fact further peace and security.

³⁴ UN Human Rights Council (2019), 'Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders', A/HRC/40/52 (<https://undocs.org/en/A/HRC/40/52>)

³⁵ UN Human Rights Council (2020), 'Human rights impact of policies and practices aimed at preventing and countering violent extremism', A/HRC/43/46, para. 20 (<https://undocs.org/en/A/HRC/43/46>)

3

Applying Article 7: the assessment process

As noted earlier, the application of the ATT's Article 7 provisions concerning terrorism and TNOC to specific arms exports should be undertaken as part of a State Party's overall export risk assessment process. During this process other criteria included in Article 7 – including relating to peace and security, international humanitarian and human rights law, and gender-based violence – plus the risk of diversion, as per Article 11, should also be applied. This risk assessment process should be part of an established national control system as required under ATT Article 5 (detailed information on the construction and composition of an effective arms transfer control system can be found in ATT Expert Group briefing No.5³⁶ and guidance as to how to undertake an export risk assessment can be found in briefing No.6³⁷).

The following seeks to provide an elaboration of a step-by-step process for the application of ATT Article 7(1)(b)(iii–iv) from the perspective of an exporting ATT State Party. In the first instance, some of the key considerations that should contribute to, and inform, a thorough and objective risk assessment will be set out; following this, practical illustrations of a number of relevant potential scenarios will be provided by way of a number of hypothetical arms export cases.

Step 1: Identifying obligations and offences

When considering whether or not a proposed arms export could be used to commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism or TNOC to which it is a party, a competent authority within the exporting state should:

- a. identify those legal instruments relating to terrorism and TNOC to which the State is a Party
- b. compile a list of offences under those legal instruments identified
- c. conduct regular checks to update the list of legal instruments and associated offences

The first two elements of this process – as set out in points a. and b. above – would not be undertaken anew for each licence application. Instead, an initial compilation

³⁶ Saferworld (2016), 'Implementing the ATT: Essential elements of an effective arms transfer control system', ATT Expert Group Briefing No.5, July (<http://www.saferworld.org.uk/resources/publications/1081-implementing-the-att-essential-elements-of-an-effective-arms-transfer-control-system>)

³⁷ Saferworld (2018), 'Implementing the ATT: Undertaking an arms transfer risk assessment', ATT Expert Group Briefing No.6, August (<https://www.saferworld.org.uk/resources/publications/1181-implementing-the-att-undertaking-an-arms-transfer-risk-assessment>)

exercise would be undertaken with a view to setting out a list of applicable instruments and relevant offences, which would only need to be updated as and when changes occurred. The list, and subsequent updates, should be made available to all relevant personnel concerned with the arms export assessment process within a competent national authority (a comprehensive list of instruments relating to terrorism and TNOC and an associated list of offences thereunder can be found in the Annex to this briefing).

Step 2: Assessing the risks

In order to carry out a fully informed assessment of the terrorism and TNOC risks associated with a prospective arms export, the competent authority will need to access information concerning the risks of terrorism and TNOC in potential recipient countries. Information can be provided by the exporting state's own resources, including for example its foreign ministry and its law enforcement, intelligence and security services; in addition, a wide variety of organisations (including UN bodies, Interpol/Europol, research and academic institutions, NGOs, media outlets³⁸ and other sources) provide information online, while private companies can also provide risk profiling services for purchase. Documented research that is conducted as part of an arms export risk assessment should provide material for a database of country/recipient profiles and for the development of institutional knowledge which can be drawn upon, and updated, for use in subsequent assessments. Drawing upon an existing body of information may enable relatively quick decisions to be made concerning the risks of an arms export being used in connection with terrorist acts or TNOC; equally, such information may also suggest where additional and more in-depth investigation needs to be carried out into the prospective recipient and/or country of destination.

Commit/facilitate

When assessing the risk that an arms export could be used to commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism or TNOC to which it is a party, the exporting State Party is bound to consider *its own* obligations under international law – and not the obligations of the importing or destination country. Having identified the applicable terrorism- and TNOC-related instruments and the offences therein, and bearing in mind that these offences may be committed by states as well as by non-state actors, the competent authority within an ATT State Party must consider the risk that the arms proposed for export could:

- a. be used by either the importer or the intended recipient in the *commission* of the identified terrorism and TNOC offences
- b. be used by either the importer or the intended recipient in the *facilitation* of the identified terrorism and TNOC offences
- c. be *diverted* to an unauthorised recipient and used in the *commission* of the identified terrorism and TNOC offences
- d. be *diverted* to an unauthorised recipient and used in the *facilitation* of the identified terrorism and TNOC offences

³⁸ Care should be taken when using open source information – and in particular digital social media which can be difficult to verify and can present misleading information. Information that is relied upon for an arms export risk assessment should always be taken from trusted and fact-checked sources.

Current and future trends

In conducting this assessment, the potential exporting state must look *inter alia* at the past behaviour of the recipient, including for the existence of significant corruption within state structures and non-government agencies, their involvement in TNOC, or involvement in/support for acts of terrorism. However, an assessment based solely on previous behaviour – be it relatively recent or more historical – is insufficient, as it may not provide a complete picture of the risks that exist. In addition, therefore, the potential exporting state must take a wider, forward-looking view of national/ regional trends and the potential for changed circumstances, including in relation to developing instability, conflict, insurgency, paramilitary activity, organised criminal actions and corruption. Even if such factors are, at the time of the assessment, of relatively limited or moderate concern, if the instances are increasing this could point to a much bigger problem in future.

Peace and security

Article 7 of the ATT also requires an exporting State Party to consider whether a proposed arms export *would contribute to or undermine* peace and security. As discussed in the legal analysis earlier, any export of arms that presents a risk of being used to commit or facilitate offences under terrorism or TNOC instruments is far more likely to *undermine* rather than *contribute* to peace and security – whether it is human, national, regional or international peace and security. Accordingly, where the application of 7(1)(b)(iii–iv) concludes that a proposed arms export could be used to commit or facilitate offences under conventions or protocols relating to terrorism or TNOC, it is very unlikely that the application of ATT Article 7(1)(a) would serve to ameliorate any such concerns and, instead, would almost certainly reinforce the likelihood of the negative outcomes.

It is important also to consider situations where the export/import of arms is seen as a potential means of preventing or combatting terrorism or TNOC offences taking place. Such circumstances could involve a prospective importing state claiming that the purchase of certain arms is necessary to enable them to respond to a perceived terrorist or criminal threat, and thereby protect peace and security. The implication that follows is that a failure by the exporting state to supply arms would, in effect, undermine peace and security. However, such assertions by prospective importing states that their actions are necessary or designed to address terrorism or TNOC may be spurious; their description of certain actors as terrorist or criminal may also be designed to serve complicated political ends and so be open to dispute. Accordingly, claims of this nature should not be accepted at face value; indeed, they should be subject to no less interrogation than any other aspect of a prospective arms transfer. Furthermore, the ‘peace and security’ justification should not be the basis for failing to apply the provisions of the ATT in a ‘consistent, objective and non-discriminatory manner’,³⁹ nor for authorising transfers where they would contravene any or all of Articles 6, 7(1)(b), 7(4) or 11.

Mitigation measures

It is possible, however, to envisage circumstances where consideration is being given to the exportation of arms to a state that is experiencing peace and security challenges and where the competent authority of the exporting state identifies some low-level risks of the arms in question being used to commit or facilitate offences as described under terrorism or TNOC instruments. In such cases, the exporting State Party may choose to explore, jointly with the prospective importing state, the possibility of

³⁹ United Nations (2013), ‘The Arms Trade Treaty’, Principles (<https://www.thearmstradetreaty.org/hyper-images/file/TheArmsTradeTreaty1/TheArmsTradeTreaty.pdf>)

mitigation measures to address the perceived risks. In this regard, mitigation measures are specific targeted measures – beyond those, such as end-user certificates, that are part of the normal arms export risk assessment process – which are adopted in order to negate particular identified risks. In such a situation, the mitigation measures should be deployed in advance of the arms export, which should then proceed only if the measures in question have demonstrably achieved the desired effect.

Decision-making

Pursuant to the above process, a State Party will need to make a decision on whether to authorise or deny an export, based on their assessment of the information at their disposal. Some hypothetical scenarios for the potential export of a range of arms to countries/end-users facing a variety of challenges are set out, for consideration, in the next chapter.

4

Arms export assessment: five hypothetical cases

The following hypothetical cases set out a variety of scenarios involving potential arms exports. These have been developed in order to stimulate discussion on how a range of factors and concerns might shape and feed into the assessment process and its conclusions. In some of the scenarios presented, concerns relate to other export criteria, including ATT Articles 7(1)(a), 7(1)(b)(i) and (ii), 7(4) and 11(2); however, the assessment that is being considered here relates only to arms that could be used to commit or facilitate terrorism or TNOC offences as set out in ATT Article 7(1)(b)(iii) and (iv).

Example 1

Country A is considering the export of 150 hand guns to the police force in Country B, where certain densely populated urban areas are not under effective control of the state authorities and are, instead, more in the grip of organised criminal groups with suspected links to elements of the national security services.

Assessing risks: Open-source information points to widespread and long-standing corruption at all ranks among police in Country B – specifically whereby payment is given and received so as to ensure that law enforcement officers do not act on clear evidence of organised criminal activity among armed gangs, including international drug-trafficking and money-laundering operations.

Relevant offences: Country A is a Party to the UN Convention against Transnational Organized Crime which requires States Parties to create domestic criminal offences covering a range of illicit activities, including corruption and money laundering. Corruption is committed when a public official solicits or accepts an undue advantage, whether directly or indirectly, in order that the official in question acts or refrains from acting in the exercise of her or his official duties.

Consultations: Following an approach to relevant authorities in Country B, there has been a commitment from the Minister of the Interior to provide a two-week anti-corruption training with a one-week refresher course after six months for all police, starting with those working in units identified as prone to corruption.

Decision: ?

Example 2

Country C is considering the export of 250 automatic rifles, 50,000 rounds of ammunition and ten armoured vehicles to the army in Country D which is fighting an armed insurgency in its borderlands. The insurgents are known for committing acts of terror – including hostage-taking – as a means of coercing and subduing the civilian population in the areas where they are active and as a means of creating leverage over the national state authorities.

Assessing risks: There is some suggestion that some level of support for the insurgents exists within the state security apparatus in Country D. Moreover, there have been a number of clashes between state security forces and insurgents where the former have been overrun, and military personnel, vehicles, weapons and ammunition have been captured. There has also been a small, but significant, number of low and medium-ranked military personnel who have defected to join the insurgents, taking arms and ammunition with them. Accordingly, if Country C was to export rifles to Country D, and they were subsequently deployed to active military units, the possibility exists that the weapons could be captured by insurgents, or diverted by defectors, and used *inter alia* in hostage-taking.

Relevant offences: Country C is a Party to the International Convention Against the Taking of Hostages (1979) which establishes a single primary offence – the taking of hostages – which the Convention defines as seizing or detaining, and threatening to kill, injure, or continue to detain, another person, in order to compel a third party to do, or abstain from doing, any act as an explicit or implicit condition for the release of the hostage.

Consultations: Following discussions with the authorities in Country D, it becomes clear that there is little that can be done in the short term to reduce the risks that arms, if exported, would fall into the hands of insurgents. While better training and greater professionalism in the security forces of Country D may be able to offset such risks, this may take some time and require external assistance. Meanwhile, the government appears keen to play down the extent of the sympathy for the insurgents that exists within the military.

Decision: ?

Example 3

Country E is considering the export of military-spec very high frequency (VHF) handheld transceivers and 200 submachine guns to international peacekeeping forces located in Country F, a fragile state that is emerging from civil war and where a complex range of threats coexist, from terrorist bombings to people trafficking.

Assessing risks: Previous exports of military equipment from Country E's partner countries A and C to international forces located in Country F have yielded varying outcomes. While a number of shipments over the past two years have arrived safely with their intended recipients, more recently a shipment of ammunition and body armour was held up at the main airport by the local authorities due to alleged paperwork irregularities; this materiel subsequently disappeared before steps could be taken to resolve the supposed problem. The exact whereabouts of the shipment is unknown, but local militias who are involved in bombings and human smuggling activities have been seen wearing body armour similar, if not identical, to that included in the missing shipment.

Relevant offences: Country E is Party to the International Convention for the Suppression of Terrorist Bombings (1997), which establishes offences including: delivering, placing, discharging or detonating an explosive or other lethal device into a state, government or public place or facility in order to cause death or injury; and in order to cause death or injury/in order to cause destruction and economic loss. Attempting, organising, directing, participating or contributing to such activities are also offences under this treaty. Country E is also Party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), which requires states to criminalise trafficking in persons for the purpose of exploitation, in addition to attempting to traffic, participating as an accomplice, and organising or directing other persons to engage in people trafficking.

Consultations: The fragmented nature of authority in Country F means that consultations regarding the security of arms shipments are difficult. Efforts to locate a competent authority at the country's main airport have yielded little in the way of understandings or guarantees. The only course of action that would guarantee safe passage of the arms shipment to the international forces would be to provide the shipment of two-way radios and submachine guns with a military escort. However, concerns remain regarding the potential provocation that this might create within an already unstable environment.

Decision: ?

Example 4

Country G is in the process of agreeing a contract for the export of six attack helicopters and 12 fixed-wing combat aircraft to Country H – an ally and emerging regional power. Country H has been strengthening its military forces over the past decade and has spent billions of US dollars in the process.

Assessing risks: While at first the discussions around the contract were proceeding smoothly towards a conclusion, the prime exporting company in Country G for the helicopters unexpectedly declared its intention that the deal should be arranged through two intermediaries – one based in Country G and the other in Country H – who are rumoured to be receiving significant sums for an unspecified amount of work. Preliminary research suggests that one intermediary has strong personal connections to the Chief Financial Officer of the exporting company in Country G, while both intermediaries are directors of companies that have won tenders for civil construction projects in countries in the same sub-region as Country H. Neither have a track-record of being involved in arms deals. Unsubstantiated rumours are circulating that bribes have been paid to Ministry of Defence (MoD) personnel in Country G to turn a blind eye to any unusual activity.

Relevant offences: Countries G and H are both Parties to the UN Convention Against Transnational Organized Crime which requires States Parties to create the domestic criminal offence of corruption, which is committed when a public official solicits or accepts an undue advantage, whether directly or indirectly, in order that the official in question acts or refrains from acting in the exercise of her or his official duties.

Consultations: The Ministry of Finance in Country H has been requesting information from the MoD in Country G regarding the need for these new arrangements. The MoD has not provided a satisfactory reply and has so far been reluctant to share detailed information about the work for which the intermediaries have been paid. The Ministry of Finance in Country H has also been in contact with the licensing authority in Country G, but they maintain that these concerns are not their business and are a matter for the exporter company and Country H.

Decision: ?

Example 5

Country Y is considering the export of 200 hand guns to the police force in Country Z, where certain densely populated urban areas are not under effective control of the state authorities and are, instead, more in the grip of organised criminal groups with suspected links to elements of the national security services.

Assessing risks: Intelligence sources point to some past links between the police in Country Z, and criminal groups, including involvement in drug-trafficking and gun running. However, following concerted action by the authorities, such connections are now considered to be relatively limited in their extent.

Relevant offences: Country Y is a party to the UN Convention against Transnational Organized Crime which requires States Parties to create domestic criminal offences covering a range of illicit activities, including corruption and money laundering. Corruption is committed when a public official solicits or accepts an undue advantage, whether directly or indirectly, in order that the official in question acts or refrains from acting in the exercise of her or his official duties.

Consultations: Discussions with relevant authorities in Country Z have resulted in the government providing assurances that the hand guns are intended for a new police anti-corruption unit which is run from the office of the Prime Minister. Furthermore, there is an interest in establishing effective mitigation measures, including through the implementation of safeguards to ensure the individual responsibility of all police officers for their service weapons, including prohibiting them from taking their weapons home. Discussions with the Prime Minister's office have indicated that terms of reference are being drafted for the establishment of the new regime of safeguards.

Decision: ?

ATT EXPERT GROUP

ANNEX:**Offences under international conventions or protocols relating to terrorism and to transnational organised crime**

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Offences under transnational organised crime treaties

United Nations Convention against Transnational Organized Crime (2000)

The United Nations Convention against Transnational Organized Crime (UNTOC) specifically addresses transnational crimes and offences. The Convention notes that offences are transnational if:

- they are committed in more than one state
- they are committed in one state but a substantial part of their preparation, planning, direction or control takes place in another state
- they are committed in one state but involve an organised criminal group that engages in criminal activities in more than one state
- they are committed in one state but have substantial effects on another state.

The Convention then establishes four broad offences: (1) participation in an organised criminal group; (2) laundering the proceeds of crime; (3) corruption; and (4) obstruction of justice.

Participation in an organised criminal group

Under the UNTOC, it is an offence to participate in an organised criminal group. Most typically, this offence consists of agreeing with one or more other people to commit a serious crime, for a purpose relating, whether directly or indirectly, to obtaining a financial or other material benefit from that crime. In other words, it is an offence to conspire with others to commit a serious crime with the purpose of benefitting from that crime.

In addition, a person is guilty of participating in an organised criminal group when he or she takes an active part in an organised group's criminal activities, or takes an active part in the group's other activities with knowledge that this participation will contribute to the achievement of the group's criminal aim.

Finally, a person is guilty of participating in an organised criminal group when he or she organises, directs, aids, abets, facilitates or counsels the commission of a serious crime involving an organised criminal group.

Laundering the proceeds of crime

Under the UNTOC, it is an offence to launder the proceeds of crime, which the Convention notes must include the widest range of predicate offences – in other words, the widest range of crimes that are components of the ultimate offences.

Classic laundering consists of converting or transferring property, with the knowledge that the property is the proceeds of crime, with the purpose either of concealing the illegal origin of the property or of helping a person involved in the predicate offence evade legal consequences.

Additional activities that constitute laundering include:

- concealing or disguising the true nature, source, location, disposition, movement, ownership of or rights to property, knowing that the property is the proceeds of crime
- acquiring, possessing or using property, knowing – at the time the property is received – that the property is the proceeds of crime.

Finally, a person launders the proceeds of crime when he or she participates in; associates with; enters into a conspiracy to commit; attempts to commit; and aids, abets, facilitates, or counsels the commission of any of the offences established in the Convention.

Corruption

Under the UNCTOC, there are two offences contained under the umbrella of 'corruption'.

The first offence is committed when an individual promises, offers or gives to a public official, whether directly or indirectly, an undue advantage, to motivate the official to act or refrain from acting in the exercise of her or his official duties. It is not necessary that the promised advantage be destined for the official; it could be directed to another person or entity.

The second offence that constitutes corruption is committed when a public official solicits or accepts an undue advantage, whether directly or indirectly, in order that the official acts or refrains from acting in the exercise of her or his official duties. Again, it is not necessary that the promised advantage be destined for the official; it could be directed to another person or entity.

In other words, corruption has been committed when a person attempts to bribe an official, and corruption equally has been committed when an official solicits or accepts a bribe.

Finally, a person is guilty of corruption when they are an accomplice to the commission of corruption.

Obstruction of justice

Under the UNCTOC, it is an offence to obstruct justice. The treaty defines two specific offences as obstruction of justice.

First, obstruction of justice is the use of physical force, threats or intimidation – or the promise, offering or giving of an undue advantage – in order to induce false testimony or to interfere in the testimony or production of evidence in a proceeding relating to TNOC offences.

Second, obstruction of justice is also the use of physical force, threats or intimidation to interfere with the exercise of a justice or law enforcement official's duties relating to TNOC offences.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children requires that states criminalise trafficking in persons for the purpose of exploitation, as well as attempting to traffic in persons, participating as an accomplice in trafficking in persons, and organising or directing other persons to traffic in persons.

The Protocol defines 'trafficking in persons' broadly. First, it notes that recruitment, transportation, transfer, harbouring or receipt of persons are all activities covered under 'trafficking in persons'.

Second, the Protocol discusses various means of committing trafficking in persons: the threat or use of force or other forms of coercion; fraud; deception; abuse of power; abuse of a position of vulnerability; or the giving or receiving of benefits to achieve the consent of a person who has control over another person.

Third, the Protocol notes that trafficking in persons must be carried out for the purposes of exploiting the victim(s). That exploitation could include exploiting the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery and related practices, servitude, and the removal of organs.

Finally, the Protocol makes two important clarifications. First, the Protocol makes clear that a victim of trafficking cannot consent to the intended exploitation, so long as the means noted above are used in trafficking the victim. Second, the Protocol notes that the means noted above need not be used to convict an offender of trafficking in persons if the victim is a child.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Under the Protocol against the Smuggling of Migrants by Land, Sea and Air, States Parties must criminalise various activities relating to smuggling migrants. Those offences are as follows.

First and foremost, the Protocol includes the actual offence of smuggling of migrants. The Protocol defines that offence as the procurement of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident. For the activity to constitute migrant smuggling, the perpetrator must have carried it out in order to obtain, whether directly or indirectly, a financial or other material benefit in exchange for their smuggling of migrants.

Second, the Protocol requires States Parties to criminalise procuring, providing or possessing fraudulent travel or identity documents, when that activity is done with the purpose of enabling smuggling migrants. A person is guilty of the offence when they are responsible for any travel or identification document that has been falsely made or altered by anyone other than a person or agency authorised to make, issue or modify such documents. Alternatively, a person is guilty of the offence when they are responsible for any travel or identification document that has been improperly issued or obtained through misrepresentation, corruption or duress. Finally, a person is guilty of the offence when they are responsible for any travel or identification document that is being used by any person other than the document's rightful holder.

Third, the Protocol requires States Parties to criminalise enabling a person who is not a national or permanent resident of a state to remain in the state without complying with the legal requirements to stay there, instead using either means set out above or any other illegal means.

As with many other similar treaties, the Protocol also requires States Parties to criminalise attempting the above offences, participating as an accomplice in their commission, and organising or directing other persons to commit the offences.

Finally, unlike most other related agreements, the Protocol defines certain offences as 'aggravated': an offence listed above is an 'aggravated offence' where it endangers, or is likely to endanger, the lives or safety of the migrants concerned. Likewise, an offence is 'aggravated' when it entails inhuman or degrading treatment of migrants, including such treatment for the migrants' exploitation.

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

Under the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, States Parties must criminalise the following offences.

The first offence established under the Protocol is the illicit manufacturing of firearms, as well as of their parts and components and of ammunition. Various activities constitute 'illicit manufacturing'. Firearms (and their parts and components, and

ammunition) are illicitly manufactured when they are manufactured or assembled under the following circumstances:

- from parts and components that were illicitly trafficked
- without a licence or authorisation from a competent authority of the State Party where the activities take place
- without marking the firearms at the time of manufacture.

The second offence established under the Protocol is the illicit trafficking in firearms, as well as in their parts and components and in ammunition. 'Illicit trafficking' includes the import, export, acquisition, sale, delivery, movement, or transfer of firearms, their parts and components, and/or ammunition from or across the territory of one State Party to another State Party, so long as one of the involved States Parties does not authorise the transfer. Illicit trafficking also occurs when a transfer of firearms, their parts and components, and/or ammunition is not properly marked.

Finally, the third offence established under the Protocol is the falsifying or illegally obliterating, removing or altering the markings on firearms.

In addition, as with many other related agreements, the Protocol establishes as offences: attempting to commit the above offences; participating as an accomplice in those offences; aiding and abetting in those offences; and organising, directing, facilitating or counselling the commission of those offences.

Offences under counter-terrorism treaties

There are 19 primary treaties and protocols that address terrorism and/or related acts. Sixteen of those agreements broadly fall into four thematic categories: aircraft/civil aviation; nuclear materials; maritime regulation; and explosives. The remaining three touch on issues relating to financing terrorism, the taking of hostages, and crimes against internationally protected persons. The vast majority of these agreements set out and define specific offences, or, as is the case with some of the protocols, modify the definitions of offences set out in earlier agreements.

This section goes through the counter-terrorism treaties and protocols according to the thematic categories laid out above, clarifying what types of behaviour constitute offences under each agreement.

Aircraft and/or civil aviation

Seven treaties or protocols address acts of terrorism related to aircraft and/or civil aviation. The agreements are the following:

1. Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010)
2. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971)
3. Convention for the Suppression of Unlawful Seizure of Aircraft (1970)
4. Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010)
5. Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963)
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988)

7. Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft (2014)

Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010)

The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010) lays out 14 activities that States Parties have agreed constitute offences under the treaty. Those offences are the following:

1. Intentionally performing an act of violence against another person while on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft.
2. Destroying an aircraft, or causing damage to an aircraft that renders it incapable of flying or that is likely to endanger the aircraft's safety in flight.
3. Placing on an aircraft a device or substance likely to destroy the aircraft, likely to cause damage to it rendering it incapable of flight, or likely to endanger its safety in flight.
4. Destroying or damaging air navigation facilities, or interfering with their operation, if these acts are likely to endanger the safety of an aircraft in flight.
5. Communicating information known to be false, thereby endangering the safety of an aircraft in flight.
6. Using an aircraft to cause death, serious bodily injury, or serious damage to property or to the environment.
7. Releasing or discharging from an aircraft any biological, chemical or nuclear (BCN) weapon or explosive, or any radioactive or similar substance that causes, or is likely to cause, death, serious bodily injury or serious damage to property or to the environment.
8. Using against, or on board, an aircraft any BCN weapon or explosive, or any radioactive or similar substances, that cause or is likely to cause death, serious bodily injury or serious damage to property or to the environment.
9. Transporting or facilitating the transport, on board an aircraft, of any explosive or radioactive material with the knowledge that its intended use is to cause or threaten to cause death or serious injury or damage, with the purpose of intimidating a population or compelling a government or international organisation to do or abstain from doing any act.
10. Transporting or facilitating the transport, on board an aircraft, of any BCN weapon.
11. Transporting or facilitating the transport, on board an aircraft, of any source material, special fissionable material, or equipment or material related to fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity.
12. Transporting or facilitating the transfer, on board an aircraft, of any equipment, materials, software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon.
13. Performing an act of violence against a person at an airport which causes or is likely to cause serious injury or death, using any device, substance or weapon, in a way that endangers or is likely to endanger safety at that airport.
14. Destroying or seriously damaging the facilities of an airport, using any device, substance or weapon, in a way that endangers or is likely to endanger safety at that airport.

As with many other agreements relating to terrorism, this treaty also defines as offences: threatening to commit offences; attempting to commit offences; organising or directing others to commit offences; assisting another person to evade investigation, prosecution or punishment relating to committing offences; agreeing with one or more persons to commit offences; and contributing to the commission of offences by

a group, whether by aiming to further the group's general criminal activity or with knowledge of the intention of the group.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971)

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) lays out five activities that States Parties have agreed constitute offences under the treaty. Those offences are the following:

1. Committing any act of violence against another person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft.
2. Destroying an aircraft, or causing damage to an aircraft that renders it incapable of flying or that is likely to endanger the aircraft's safety in flight.
3. Placing on an aircraft a device or substance likely to destroy the aircraft, likely to cause damage to it rendering it incapable of flight, or likely to endanger its safety in flight.
4. Destroying or damaging air navigation facilities, or interfering with their operation, if these acts are likely to endanger the safety of an aircraft in flight.
5. Communicating information known to be false, thereby endangering the safety of an aircraft in flight.

As with many other agreements relating to terrorism, this treaty also defines as offences: attempting to commit offences; acting as an accomplice of a person who commits or attempts to commit offences.

Convention for the Suppression of Unlawful Seizure of Aircraft (1970)

The Convention for the Suppression of Unlawful Seizure of Aircraft (1970) establishes just one primary offence. Under the agreement, it is an offence when, on board an aircraft in flight, a person unlawfully and by force, threat of force, or other intimidation, seizes or exercises control of the aircraft, or attempts to do so. The Convention also prohibits acting as an accomplice of a person who performs or attempts to perform such an act.

Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010)

The Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010), which modifies the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), replaces the offences laid out in the 1970 Convention with the following two offences:

1. Seizing or exercising control of an aircraft by force or threat of force, by coercion, by any other form of intimidation, or by any technological means.
2. Making a credible threat to commit other offences defined under this protocol or under the 1970 Convention.

In addition, as with other related treaties, the Protocol establishes as offences: attempting to commit an offence; organising or directing others to commit an offence; participating as an accomplice in an offence; assisting another person to evade investigation, prosecution or punishment for an offence; agreeing with one or more persons to commit an offence; and contributing to the commission of offences by a group, whether by aiming to further the group's general criminal activity or with knowledge of the intention of the group.

Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963)

The Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963) primarily attempts to coordinate States Parties' responses to pre-existing offences under those states' penal laws. In addition, the agreement establishes, as an

offence, acts which may or do jeopardise the safety of an aircraft or of the persons or property on that aircraft, as well as acts which jeopardise good order and discipline on board an aircraft.

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988)

The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988), which modifies the Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963), sets out just two offences:

1. Performing an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death, if that act endangers or is likely to endanger safety, when committed unlawfully, intentionally, and using any device, substance or weapon.
2. Destroying or seriously damaging the facilities of an airport that serves international civil aviation, or an aircraft not in service located there, or disrupting the services of the airport, if that act endangers or is likely to endanger safety, when committed unlawfully, intentionally, and using any device, substance or weapon.

Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft (2014)

The Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft (2014), which modifies the Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963), does not set out any new offences.

Nuclear

International Convention for the Suppression of Acts of Nuclear Terrorism (2005)

The International Convention for the Suppression of Acts of Nuclear Terrorism (2005) sets out four offences:

1. Possessing radioactive material, or making or possessing a device, with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or the environment.
2. Using, in any way, radioactive material or a device, or using or damaging a nuclear facility in a manner which releases or risks the release of radioactive material, with the intent to cause death or serious bodily injury, or with the intent to cause substantial damage to property or to the environment, or with the intent to compel a natural or legal person, an international organisation or a state to do or refrain from doing an act.
3. Credibly threatening to commit the above offences.
4. Demanding, unlawfully and intentionally, radioactive material, a device or a nuclear facility, by means of credible threat or use of force.

In addition, the Convention establishes as offences: attempting to commit offences; participating as an accomplice in offences; organising or directing others to commit offences; or contributing to the commission of offences by a group, whether by aiming to further the group's general criminal activity or with knowledge of the intention of the group.

Convention on the Physical Protection of Nuclear Material (1980)

The Convention on the Physical Protection of Nuclear Material (1980) does not establish clear offences, instead focusing on the activities that States Parties are bound to undertake for the protection of nuclear materials.

Amendments to the Convention on the Physical Protection of Nuclear Material (2005)

The Amendments to the Convention on the Physical Protection of Nuclear Material (2005) do not establish clear offences, but instead require that States Parties ‘establish and maintain a legislative and regulatory framework’ that governs the physical protection of nuclear materials.

Maritime

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988)

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988) sets out seven offences:

1. Seizing or exercising control of a ship by force, by threat of force or by intimidation.
2. Performing an act of violence against a person on board a ship, if that act is likely to endanger the safe navigation of the ship.
3. Destroying a ship, or causing damage to a ship or its cargo, if that act is likely to endanger the safe navigation of the ship.
4. Placing a device or substance on a ship that is likely to destroy the ship, or to cause damage to the ship or its cargo, if that act is likely to endanger the safe navigation of the ship.
5. Destroying or seriously damaging maritime navigational facilities or interfering with their operation, if that act is likely to endanger the safe navigation of a ship.
6. Knowingly communicating false information endangering the safe navigation of a ship.
7. Injuring or killing any person in connection with committing, or attempting to commit, the offences listed above.

As with many other agreements relating to terrorism, this treaty also defines as offences: attempting to commit offences; abetting others in the commission of offences; or threatening other physical or legal persons in order to compel them to commit offences, if those offences are likely to endanger the safe navigation of a ship.

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (1988)

The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (1988), which modifies the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988), establishes four offences. These offences are all relevant to ‘fixed platforms’, which are defined by the Protocol as an ‘artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes.’¹ The Protocol establishes the following offences:

1. Seizing or exercising control over a fixed platform, by force, by threat of force or by any other form of intimidation.
2. Destroying a fixed platform or causing damage likely to endanger the fixed platform’s safety.
3. Placing a device or substance on a fixed platform that is likely to destroy the platform or to endanger its safety.
4. Injuring or killing any person in connection with committing or attempting to commit the above offences.

¹ Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (1988), Article 1.

As with many other agreements relating to terrorism, this treaty also defines as offences: attempting to commit offences; abetting others in the commission of offences; or threatening other physical or legal persons in order to compel them to commit offences.

Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (2005)

The Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (2005), which modifies the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (1988), establishes the following offences:

1. Using or discharging any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death, serious injury or damage, against or on a fixed platform, or discharged from a fixed platform, for the purpose of intimidating a population or compelling a government or international organisation from doing, or abstaining from doing, any act.
2. Discharging from a fixed platform oil, light natural gas or another hazardous or noxious substance likely to cause death, serious injury or damage, with the purpose of intimidating a population or compelling a government or international organisation from doing or abstaining from doing any act.
3. Threatening to commit either of the above offences with the purpose of intimidating a population or compelling a government or international organisation from doing or abstaining from doing any act.
4. Injuring or killing any person in connection with the commission of the above offences.

In addition, the Protocol establishes as offences: attempting to commit offences; participating as an accomplice in offences; organising or directing others to commit offences; or contributing to the commission of offences by a group, whether by aiming to further the group's general criminal activity or with knowledge of the intention of the group.

Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005)

The Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005), which modifies the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988), establishes the following offences:

1. Knowingly communicating false information, thereby endangering the safe navigation of a ship.
2. Threatening to commit any of the offences under the Convention in order to compel another to do, or refrain from doing, something.
3. Using against, or on, a ship, or discharging from a ship, any explosive, radioactive material or BCN weapon in a way that causes or is likely to cause death, serious injury or damage, with the purpose of intimidating the population or compelling a government or international organisation to do, or abstain from doing, any act.
4. Discharging oil, light natural gas or another hazardous or noxious substance that causes, or is likely to cause, death, serious injury or damage, with the purpose of intimidating the population or compelling a government or international organisation to do or abstain from doing any act.
5. Using a ship in a manner that causes death, serious injury or damage, with the purpose of intimidating the population or compelling a government or international organisation to do, or abstain from doing, any act.

6. Threatening to commit the above offences, with the purpose of intimidating the population or compelling a government or international organisation to do, or abstain from doing, any act.
7. Transporting on a ship any explosive or radioactive material, knowing that such material is intended to cause death, serious injury or damage, for the purpose of intimidating the population or compelling a government or international organisation to do, or abstain from doing, any act.
8. Transporting on a ship any BCN weapon, knowing it to be a BCN weapon.
9. Transporting on a ship any source material, special fissionable material or related equipment, knowing it is intended to be used in a nuclear explosive activity or in any other nuclear activity outside of International Atomic Energy Agency safeguards.
10. Transporting on a ship any equipment, materials, software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon.
11. Unlawfully and intentionally transporting another person on board a ship, knowing that person has committed an offence and intending to assist that person to evade criminal prosecution.
12. Unlawfully and intentionally injuring or killing any person in connection with the commission of any of the above offences.

In addition, the Protocol establishes as offences: attempting to commit offences; participating as an accomplice in offences; organising or directing others to commit offences; or contributing to the commission of offences by a group, whether by aiming to further the group's general criminal activity or with knowledge of the intention of the group.

Explosives

International Convention for the Suppression of Terrorist Bombings (1997)

The International Convention for the Suppression of Terrorist Bombings (1997) establishes two offences:

1. Unlawfully and intentionally delivering, placing, discharging or detonating an explosive or other lethal device in, into, or against a place of public use, a state or government facility, public transportation, or an infrastructure facility, with the intent to cause death or serious bodily injury.
2. Unlawfully and intentionally delivering, placing, discharging or detonating an explosive or other lethal device in, into, or against a place of public use, a state or government facility, public transportation, or an infrastructure facility, with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

In addition, the Protocol establishes as offences: attempting to commit offences; participating as an accomplice in offences; organising or directing others to commit offences; or contributing to the commission of offences by a group, whether by aiming to further the group's general criminal activity or with knowledge of the intention of the group.

Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)

The Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991) does not establish offences, but instead requires States Parties to take necessary and effective measures to prohibit and prevent the manufacture of unmarked explosives in their territory, and to prohibit and prevent the movement into or out of their territory of unmarked explosives.

Other

International Convention for the Suppression of the Financing of Terrorism (1999)

The International Convention for the Suppression of the Financing of Terrorism (1999) establishes two offences:

1. By any means, directly or indirectly, unlawfully and wilfully, providing or collecting funds with the intention that they be used or knowing that they are to be used to carry out an act that is an offence in one of the treaties listed in the Convention's annex.²
2. By any means, directly or indirectly, unlawfully and wilfully, providing or collecting funds with the intention that they be used or knowing that they are to be used to carry out any other act intended to cause death or serious bodily injury to a civilian or any other person not taking an active part in the hostilities in armed conflict, when the purpose is to intimidate a population or to compel a government or international organisation to do or to abstain from doing any act.

In addition, the Convention establishes as offences: attempting to commit offences; participating as an accomplice in offences; organising or directing others to commit offences; or contributing to the commission of offences by a group, whether by aiming to further the group's general criminal activity or with knowledge of the intention of the group.

International Convention Against the Taking of Hostages (1979)

The International Convention Against the Taking of Hostages (1979) establishes a single primary offence – the taking of hostages – which the Convention defines as seizing or detaining, and threatening to kill, injure, or continue to detain, another person, in order to compel a third party to do, or abstain from doing, any act as an explicit or implicit condition for the release of the hostage.

In addition, as with other treaties relating to terrorism, the convention establishes as offences: attempting to commit an act of hostage-taking; and participating as an accomplice of anyone who commits or attempts to commit an act of hostage-taking.

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973)

The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973) establishes the following offences:

1. Intentionally murdering, kidnapping or otherwise attacking the person or liberty of an internationally protected person.
2. Intentionally carrying out a violent attack upon the official premises, the private accommodation, or the means of transport of an internationally protected person, when that act is likely to endanger the protected individual's person or liberty.

In addition, as with other treaties relating to terrorism, the Convention establishes as offences: threatening or attempting to commit the above offences; and participating as an accomplice in the above offences.

² The annex lists the following nine treaties: the Convention for the Suppression of Unlawful Seizure of Aircraft (1970); the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973); the International Convention against the Taking of Hostages (1979); the Convention on the Physical Protection of Nuclear Material (1980); the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988); and the International Convention for the Suppression of Terrorist Bombings (1997).

Saferworld

Saferworld is an independent international organisation working to prevent violent conflict and build safer lives. We work with people affected by conflict to improve their safety and sense of security, and conduct wider research and analysis. We use this evidence and learning to improve local, national and international policies and practices that can help build lasting peace. Our priority is people – we believe in a world where everyone can lead peaceful, fulfilling lives, free from fear and insecurity. We are a not-for-profit organisation working in 12 countries and territories across Africa, Asia and the Middle East.

ATT Expert Group

The ATT Expert Group is convened by Saferworld. Its purpose is to help develop common understandings among government and civil society experts from all world regions on issues relevant to ATT implementation, with a view to promoting progressive interpretation of the Treaty's provisions and the development of a robust ATT regime.

As of April 2021, the ATT Expert Group has met on eight occasions – in London, November 2013; Stockholm, May 2014; Berlin, July 2014; San José, Costa Rica, March 2015; Accra, November 2015; Amsterdam, November 2016; Waterloo, Canada, May 2018; and Dublin, January 2020. This briefing is based upon discussions that took place at these meetings. The views and ideas expressed herein should not be taken as reflecting the official view of those States or individual experts that have participated in this process.

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